

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION



JTH TAX, INC. d/b/a  
LIBERTY TAX SERVICE,

Plaintiff,

Civil No. 2:14cv556

v.

VALARIE-ANN KELLY

Serve at: 525 English Place  
Mamaroneck, New York 10543

Defendant.

**COMPLAINT**

COMES NOW the Plaintiff, JTH Tax, Inc. d/b/a Liberty Tax Service ("Liberty"), by counsel, and for its Complaint against the Defendant, Valarie-Ann Kelly ("Kelly"), states as follows:

**The Parties**

1. Liberty is a Delaware corporation with its headquarters and principal place of business at 1716 Corporate Landing Parkway, Virginia Beach, Virginia 23454.
2. Valarie-Ann Kelly is a citizen of the state of New York whose last known home address is 525 English Place, Mamaroneck, New York 10543.

**Personal Jurisdiction**

3. Personal jurisdiction over the Defendant exists in Virginia because:
  - a. In the process of purchasing and operating multiple Liberty Tax franchises and areas for development, Kelly had a substantial and continuing relationship with Liberty's headquarters in Virginia Beach, Virginia, including travel to Virginia to attend training

class in Virginia Beach, and the submission of regular reports and other regular contact with Liberty in Virginia Beach, Virginia. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1984).

b. Kelly's Franchise Agreements, Area Developer Agreements, and some Promissory Notes with Liberty contain a consent to jurisdiction clause in favor of Virginia.

### **Subject Matter Jurisdiction**

4. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity and the amount in controversy, excluding interest and costs, exceeds \$75,000.

### **Venue**

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to this cause of action arose in Virginia Beach and because Kelly's Franchise Agreements (Franchise Agreements § 15.b.) and Area Developer Agreements (Area Developer Agreements § 9.8.b) contain a forum selection clause specifying venue in this Court.

### **FACTS**

#### **Overview of Kelly's Breaches and Defaults**

6. Kelly is currently in default on a number of obligations arising under inter-related Area Developer ("AD") Agreements, Franchise Agreements, and Promissory Notes executed by Kelly and Liberty. For administrative ease, Liberty assigns an "entity number" to track these types of agreements and the performance and obligations of the parties to the Agreements. Kelly currently has five entity numbers assigned to her under which she is a party to (a) three AD Agreements, (b) twelve Franchise Agreements, and (c) eleven Promissory Notes.

7. Kelly is currently in default on each of her Promissory Notes. As detailed below, Kelly has past due obligations on six of the Promissory Notes, which has resulted in an acceleration of the amounts due under all of the Promissory Notes. Additionally, Kelly has

defaulted on certain obligations to pay royalty and advertising fees, and has breached other in-term performance obligations under the AD Agreements and Franchise Agreements.

**The Agreements**

8. Kelly is currently obligated under one AD Agreement associated with Entity Number 6002:

- a. On April 30, 2010, Kelly entered into an AD Agreement with Liberty for part of New York County, NY. A copy of the Area Developer Agreement is attached as **Exhibit 1**.

9. Kelly is currently obligated under two Franchise Agreements associated with Entity Number 6274:

- a. On December 6, 2010, Kelly entered into a Franchise Agreement with Liberty for the territory known as NJ086. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 120 Main Street, Woodbridge, NJ 07095. A copy of the Franchise Agreement is attached as **Exhibit 2**.
- b. On December 27, 2012, Kelly entered into a Franchise Agreement with Liberty for the territory known as NJ204. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 109 Watchung Avenue, Plainfield, NJ 07060. A copy of the Franchise Agreement is attached as **Exhibit 3**.

10. Kelly is currently obligated under one AD Agreement associated with Entity Number 6319:

- a. On January 7, 2011, Gregory J. Carafello ("Carafello") entered into an

AD Agreement with Liberty Tax Service for the Albany/Schenectady, New York market area. A copy of this agreement is attached as **Exhibit 4**.

- b. On April 30, 2012, the AD Agreement was amended to change the name of the area developer from Carafello to Carafello and Kelly as tenants in common. Under New York law, operation as tenants in common constitutes conducting business as a general partnership. A copy of the Assignment and Amendment to Area Developer Agreement is attached as **Exhibit 5**.

11. Kelly is currently obligated under one AD Agreement associated with Entity Number 6322:

- a. On January 19, 2011, Kelly and Bablu Shahabuddin (“Shahabuddin”) entered into an AD Agreement with Liberty Tax Service as tenants in common for the Westchester/Dutchess/Putnam, New York marketing area. A copy of this agreement is attached as **Exhibit 6**.
- b. On December 19, 2013, the Area Developer Agreement was amended to change the area developer from Kelly and Shahabuddin as tenants in common to Kelly, as sole proprietor, thereby removing Shahabuddin as owner. A copy of the Assignment and Amendment to Area Developer Agreement is attached as **Exhibit 7**.

12. Kelly is currently obligated under nine Franchise Agreements associated with Entity Number 6335:

- a. On April 6, 2011, Kelly entered into a Franchise Agreement with Liberty for the territory known as NY110. A copy of the Franchise Agreement is

attached as **Exhibit 8**.

- b. On July 22, 2013, Kelly entered into a Franchise Agreement with Liberty for the territory known as MA099. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 653 Warren Street Boston, MA 02121. A copy of the Franchise Agreement is attached as **Exhibit 9**.
- c. On April 28, 2014, Kelly entered into a Franchise Agreement with Liberty for the territory known as FL012. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 330 Clematis Street, West Palm Beach, FL 33401. A copy of the Franchise Agreement is attached as **Exhibit 10**.
- d. On April 28, 2014, Kelly entered into a Franchise Agreement with Liberty for the territory known as FL019. A copy of the Franchise Agreement is attached as **Exhibit 11**.
- e. On April 28, 2014, Kelly entered into a Franchise Agreement with Liberty for the territory known as FL059. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 6336 Forest Hill Boulevard, Greenacres, FL 33415. A copy of the Franchise Agreement is attached as **Exhibit 12**.
- f. On April 28, 2014, Kelly entered into a Franchise Agreement with Liberty for the territory known as FL060. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 2550 Okeechobee Suite G-1, West Palm Beach, FL 33409. A copy of the Franchise

Agreement is attached as **Exhibit 13**.

- g. On April 28, 2014, Kelly entered into a Franchise Agreement with Liberty for the territory known as FL062. Pursuant to this Franchise Agreement, Kelly operated a Liberty franchise office located at 3401 South Congress, Suite 102 Palm Springs, FL 33461. A copy of the Franchise Agreement is attached as **Exhibit 14**.
- h. On September 3, 2014, Kelly executed a Territory Split Amendment to the Franchise Agreement for Territory FL194. This Territory Split Amendment resulted in the addition of a newly created territory known as FL552/FL553. A copy of the Territory Split Amendment is attached as **Exhibit 15**.
- i. On September 3, 2014, Kelly entered into a Franchise Agreement with Liberty for territory FL552. A copy of the Franchise Agreement is attached as **Exhibit 16**.
- j. On September 3, 2014, Kelly entered into a Franchise Agreement with Liberty for territory FL553. A copy of the Franchise Agreement is attached as **Exhibit 17**.
- k. On September 19, 2014, Kelly executed a Territory Split Amendment to the Franchise Agreement for Territory FL060. This Territory Split Amendment resulted in the addition of a newly created territory known as FL554. A copy of the Territory Split Amendment is attached as **Exhibit 18**.
- l. On September 19, 2014, Kelly entered into a Franchise Agreement with

Liberty for territory FL554. A copy of the Franchise Agreement is attached as **Exhibit 19**.

**Liberty Financing of the Franchise Operations**

13. To finance the purchase of the area developer areas and franchises and for operating capital, Kelly executed a series of promissory notes payable to Liberty.
14. The Promissory Notes associated with Entity Number 6002 are as follows:
  - a. Kelly executed Promissory Note No. 6002-OP-AD01 dated April 30, 2010, in the amount of \$170,000.00 signed by “Valarie-Ann Kelly” as maker. To date \$141,601.28 of the principal and \$11,193.49 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 20**.
  - b. Kelly executed Promissory Note No. 6002-AD-01 dated April 30, 2012, in the amount of \$474,800.00 signed by “Valarie-Ann Kelly” as maker. To date \$319,800.00 of the principal and \$19,916.10 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 21**.
15. The Promissory Notes associated with Entity Number 6274 are as follows:
  - a. Kelly executed Promissory Note No. 6274-CIF-2014 dated January 19, 2014, in the amount of \$9,000.00 signed by “Valarie-Ann Kelly” as maker. To date \$5,501.42 of the principal and \$212.72 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 22**.
  - b. Kelly executed Promissory Note No. 6274-OP-2012-R which to date \$11,738.50 of the principal and \$453.89 of the interest is unpaid.
  - c. Kelly executed Promissory Note No. 6274-UN-02 dated December 27, 2012, in the amount of \$32,000.00 signed by “Valarie-Ann Kelly” as

maker. To date \$25,351.94 of the principal and \$1,346.92 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 23**.

16. The Promissory Notes associated with Entity Number 6319 are as follows:

- a. Carafello executed Promissory Note No. 6319-AD-01 dated January 7, 2011, in the amount of \$1,122,144.00 signed by "Gregory Carafello" as maker. To date \$714,664.16 of the principal and \$51,146.10 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 24**.
- b. On April 30, 2012, Carafello and Kelly executed an Assignment and Amendment to the Area Developer Agreement for entity 6319. The Assignment and Amendment included Kelly's agreement to become a guarantor of all the obligations under any promissory note and other amounts owed to Liberty Tax Service by entity 6319. Because the business of entity 6319 has been operated by Kelly and Carafello as a partnership, Kelly is directly obligated under the New York Partnership Law for all obligations of the business, including these amounts. A copy of the Assignment and Amendment to Area Developer Agreement is attached as **Exhibit 25**.

17. The Promissory Notes associated with Entity Number 6322 are as follows:

- a. Kelly executed Promissory Note No. 6322-AD-01 dated January 19, 2011, in the amount of \$448,000.00 signed by "Valarie-Ann Kelly" and "Bablu Shahabuddin" as makers. To date \$252,835.41 of the principal and \$15,183.79 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 26**.



- b. On December 19, 2013, Shahabuddin and Kelly executed an Assignment and Amendment to the Area Developer Agreement, which provided that Kelly shall remain a “guarantor” of all the obligations of any promissory notes and guaranty agreements or other amounts owed to Franchisor in relation to the Agreement, whether accrued prior to or after this Agreement. In addition, Kelly was directly liable under New York Partnership Law and as a maker of the promissory notes, as a matter of law, for all obligations of the business. A copy of the Assignment and Amendment to Franchise Agreement is attached as **Exhibit 27**.
18. The Promissory Notes associated with Entity Number 6335 are as follows:
- a. Kelly executed Promissory Note No. 6335-OP-2015 dated April 30, 2010, in the amount of \$636,094.28 signed by “Valarie-Ann Kelly” as maker. To date \$81,213.31 of the principal and \$8,508.34 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 28**.
  - b. Kelly executed Promissory Note No. 6335-UN-01 dated April 6, 2011, in the amount of \$32,000.00 signed by “Valarie-Ann Kelly” and “Bablu Shahabuddin” as makers. To date \$29,501.10 of the principal and \$2,310.92 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 29**.
  - c. Kelly executed Promissory Note No. 6335-UN-02 dated September 27, 2012, in the amount of \$25,718.16 signed by “Valarie-Ann Kelly” as maker. To date \$8,509.33 of the principal and \$597.37 of the interest is unpaid. A copy of this promissory note is attached as **Exhibit 30**.

- d. Kelly executed Promissory Note No. 6335-LI-01 dated April 28, 2014, in the amount of \$75,000.00 signed by “Valarie-Ann Kelly” as maker. To date \$67,754.27 of the principal and \$4,228.65.10 of the interest is unpaid.

A copy of this promissory note is attached as **Exhibit 31**.

19. The total amount of debt owed by Kelly on the Promissory Notes is \$1,658,470.72, including accrued interest through October 27, 2014.

**Past Due Accounts Receivable**

20. The Franchise Agreements attached as Exhibits 2, 3, and 8-19 each include a provision requiring Kelly to make royalty payments in the amount representing 14% of gross receipts with a minimum royalty as set forth in the Franchise Agreements.
21. The Franchise Agreements attached as Exhibits 2, 3, and 8-19 each include a provision requiring Kelly to pay an advertising fee of 5% of the gross receipts for each month.
22. Entity 6274 has \$61,175.18 in accounts receivable for royalty and advertising fees over 30 days past due. A copy of Accounts Receivable Report is attached as **Exhibit 32**.
23. Entity 6335 has \$46,006.72 in accounts receivable for royalty and advertising fees over 30 days past due.
24. In addition, Liberty charges area developers a reasonable fee for preparing or procuring, printing, and sending advertising materials and for the source of the AD franchisee leads (“AD Fees”).
25. Entity 6002 has \$16,441.69 in past due AD Fees.
26. Entity 6319 has \$8,515.08 in past due AD Fees.
27. Entity 6322 has \$1,571.23 in past due AD Fees.
28. In total, Kelly’s entities owe \$133,709.09 in past due accounts receivable.

**Kelly's Defaults on Promissory Notes**

29. Promissory Notes 6002-OP-AD01, 6274-CIF-2014, 6274-OP-2012-R, 6274-UN-02, 6319-AD-01, and 6322-AD-01 have amounts that are over 30 days past due and are in default.

30. By the terms of the Promissory Notes, "any default in the payment of any installment or payment of principal, interest or other amounts due and payable" constitutes a default.

31. The Promissory Notes each state that upon default and, at the election of Liberty, "the entire balance of [the] note and all accrued interest shall become immediately due and payable."

32. The Promissory Notes also state that a default occurs upon "any default by Obligor in the performance of, or compliance with, any provision in this Note or other agreement, document or instrument to which any Obligor and Liberty are parties. . ."

33. Kelly's defaults on the above Promissory Notes also constitute defaults on the following Promissory Notes, each of which is now immediately due and payable:

- a. 6002-AD-01
- b. 6335-OP-2015
- c. 6335-UN-01
- d. 6335-UN-02
- e. 6335-LI-11

34. Based on Kelly's numerous defaults, Liberty has accelerated payment on each of the Promissory Notes and demanded payment by Kelly on each of the Promissory Notes.

35. Each Promissory Note provides for payment of all attorneys' fees, costs, or

expenses that Liberty may incur in enforcing the Promissory Notes.

36. Kelly's outstanding balance due to the default and acceleration owed to Liberty is \$1,658,470.72, including accrued interest through October 27, 2014.

**Breaches of the Franchise and AD Agreements**

37. Kelly agreed in her Franchise Agreements that "[d]uring the term of this Agreement, [she] also agree[s] not to do any act harmful, prejudicial or injurious to Liberty." (Franchise Agreements, § 10.f.)

38. Kelly also agreed in her AD Agreements that "[d]uring the term of this Agreement, [she] also agree[s] not to do any act harmful, prejudicial or injurious to Liberty." (AD Agreement, § 9.7.)

39. Kelly has voluntarily abandoned her Liberty tax offices, failed to provide customer support to income tax clients, and failed to pay amounts owing. Among other things, Kelly has failed to pay rent, failed to pay the utilities bills which resulted in the utilities being turned off at certain locations, and has failed to pay her employees as required.

40. Kelly has failed to respond to customer issues sent to her from Liberty's issue tracker system and failed to issue customer checks, which caused customers not to receive their refunds, and the checks had to be reissued by a Liberty affiliate.

41. Liberty is being harmed by the actions of Kelly due to the damage to Liberty's goodwill with customers and franchisees.

**COUNT I**  
**BREACH OF PROMISSORY NOTES**

42. Liberty repeats and re-alleges paragraphs 1-41 as if fully set forth herein.

43. Kelly breached the promissory notes referenced herein by failing to pay all amounts due in a timely manner, resulting in damage to Liberty.

44. The total amount past due and owing to Liberty for the promissory notes is \$1,658,470.72, including accrued interest through October 27, 2014.

45. Pursuant to the terms of each of the promissory notes, Liberty is entitled to recover the principal amounts, plus interest at 12% per annum, and Liberty's attorneys' fees and costs incurred in enforcing such notes.

**COUNT II**  
**ACCOUNTS RECEIVABLE**

46. Liberty repeats and re-alleges paragraphs 1-45 as if fully set forth herein.

47. Kelly was obligated to make payments to Liberty for royalty and advertising fees in the amount of 14% and 5% of gross receipts respectively.

48. Kelly has breached the Franchise Agreements by failing to pay the royalty and advertising fees as required under the Franchise Agreements, resulting in damage to Liberty.

49. The total amount past due and owing to Liberty for accounts receivable is \$133,709.00.

**COUNT III**  
**BREACH OF FRANCHISE AND AD AGREEMENTS**

50. Liberty repeats and re-alleges paragraphs 1-49 as if fully set forth herein.

51. Kelly breached the Franchise and AD Agreements by failing to adhere to the duties contained in section 10 of the Franchise Agreements and section 9 of the AD Agreements in the ways specified above, as well as such other and further breaches as investigation and discovery may reveal.

52. Liberty has suffered damages and irreparable harm, and will continue to suffer damages and irreparable harm because of such breaches.

WHEREFORE, in consideration of the foregoing, Liberty respectfully prays for the

following relief:

1. As to Count I that Liberty be granted a judgment in the amount of \$1,658,470.72 in its favor against Kelly representing the amount currently due and unpaid on the promissory notes, plus costs and attorney's fees for enforcing the terms of the promissory notes;
2. As to Count II that Liberty be granted a judgment in the amount of \$133,709.09 in its favor against Kelly representing the amount currently due and unpaid;
3. As to Count III, that Liberty be granted judgment against Kelly in an amount to be determined at trial, including compensatory damages for loss of customers, franchisees, and goodwill due to Kelly's breaches of the franchise and AD agreements;
4. As to all Counts, that Liberty be granted a judgment for any additional or further damages resulting from Kelly's breaches and defaults, including pre-judgment and post-judgment interest on all counts; and that the Court grant Liberty such other and further relief as this Court may deem just and proper.

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE

By: 

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